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SUPREME COURT, U.S.

No. 07-397
(Application No. 07A261)
CAPITAL CASE

In the **SUPREME COURT OF THE UNITED STATES**

THOMAS D. ARTHUR
Petitioner,

v.

TROY KING, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION AND IN OPPOSITION TO A STAY OF EXECUTION

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EXECUTION SCHEDULED FOR SEPTEMBER 27, 2007

QUESTION PRESENTED

Should this Court grant Thomas Arthur's petition for writ of certiorari and motion for a stay of execution to review the issues he presents even though he could have brought this action at such a time that a full merits determination could have been made without the entry of a stay, yet, chose not to do so?

PARTIES TO THE PROCEEDING

The Parties to this action are as follows:

1) Thomas D. Arthur, Petitioner;

2) Troy King, Attorney General for the State of Alabama, in his official capacity, Respondent;

3) Bryce U. Graham, Jr., District Attorney for Colbert County, in his official capacity, Respondent;

4) Ronnie May, Sheriff for Colbert County, in his official capacity, Respondent; and

5) M. David Barber, District Attorney for Jefferson County, in his official capacity, Respondent.

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STATEMENT OF JURISDICTION

The petitioner's statement of jurisdiction is correct. Pet. at 2.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

Petitioner's statement of the constitutional provisions and statutes involved is correct. Pet. at 2.

STATEMENT OF THE CASE

Arthur is traveling what has now become a well-traveled route: filing a civil action pursuant to 42 U.S.C. § 1983 at the conclusion of federal habeas proceedings. In fact, because Arthur knew that the State would move for an execution date, he filed two separate § 1983 actions, one in the district court for the Middle District of Alabama (DNA) and the other in the district court for the Southern District of Alabama (Lethal Injection). Presumably, Arthur chose to file the two belated actions in two different courts to increase his odds of obtaining a stay of execution and forcing the defendants into lengthy litigation, thus, staving off his execution for at least a few more years.

The district court, however, dismissed Arthur's complaint because: (1) he unreasonably delayed in filing his § 1983 action; (2) due to that delay the merits could not be litigated without the entry of a stay of execution; and 3) Arthur is not entitled to a stay. Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992 (M.D. Ala. Aug, 17, 2007); (Doc. #14 at 8-26). The Court of Appeals for the Eleventh Circuit agrees with the district court's findings

and affirmed the dismissal. Arthur v. King, No. 07-13933, 2007 WL 2744884 (11th Cir. Sept. 21, 2007) (per curiam).[1] Arthur now seeks this Court's review of the lower courts' fact-bound determinations.

A. Chronology of Relevant Events

Arthur was originally convicted in 1982 for the capital offense of murdering Troy Wicker after having been convicted of a previous murder within the last 20 years. See Ala. Code § 13A-5-40(a)(13)(2006 Replacement Volume). Arthur has been on Alabama's Death Row for approximately 16 years after being convicted for capital murder and sentenced to death in 1992 (for the third time). Arthur v. State, 711 So. 2d 1031 (Ala. Crim. App. 1996); Ex parte Arthur, 711 So. 2d 1097 (Ala. 1997). Arthur exhausted his state and federal appeals when this Court denied certiorari review on April 16, 2007. Arthur v. Allen, __ U.S. __, 127 S. Ct. 2033 (Apr. 16, 2007).

Realizing that denial of certiorari meant that the State would soon move to carry out his sentence of death, Arthur filed a § 1983 action seeking physical evidence collected in connection to his crime. See Doc. 1 (complaint filed on April 12, 2007). Although representatives of Arthur began requesting access to this evidence as far back as November of 2003, Arthur waited three and a half years to file this action. In addition, on August 12, 2004, during oral argument before the Eleventh Circuit regarding his federal habeas action, Judge Barkett informed Arthur's current attorney Suhana Han that he could seek access to physical evidence in a § 1983 action, yet he still chose to wait an additional two years and eight months to file this action. Arthur, 2007 WL 2744884, at *n. 5 ("[D]uring oral argument on Arthur's

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[1] The 11th Circuit's opinion, it does not contain page numbers.

federal habeas petition in 2004, Arthur's counsel was reminded that she could seek access to physical evidence in a § 1983 claim."). Arthur's complaint does not contain any statement regarding why he waited to file his § 1983 lawsuit until his federal habeas challenge had almost concluded and he knew that the State would seek an execution date.

As Arthur must have suspected, shortly after this Court denied his petition for certiorari, the State moved the Alabama Supreme Court to set his execution date. On June 22, 2007, the Alabama Supreme Court granted the State motion and set Arthur's execution for September 27, 2007. (Doc. #14 at 7); Arthur, 2007 WL 2381992, at *4.

B. Facts of the Crime

The evidence at Arthur's third trial established that Troy Wicker was murdered on February 1, 1982, while he lay in bed at his home in Muscle Shoals. The prosecution presented the testimony of Judy Wicker. Judy Wicker testified that she began a sexual relationship with Arthur after he committed to killing her husband and that she paid him $10,000 to carry out the murder. (R. 753-54)

Talmadge Sterling, the custodian of records at the Decatur Work Release Center, where Arthur resided, testified that on February 1, 1982, Arthur had signed out for work at 6:00 a.m., and that at 7:10 in the evening Arthur had called for a ride back to the center, and that Arthur returned to the center at 7:50 p.m. (R. 502) As a part of his work release program, Arthur was assigned to work for Joel Reagan at Reagan Mobile Homes. (R. 454-57) Reagan, an old acquaintance of Arthur's, (R. 452), admitted that he did not keep track of Arthur's daily whereabouts, (R. 459), and "did not know Arthur's whereabouts on the day of the murder." (Doc. #8-1)

Patricia Green testified that Arthur frequented a local bar called Cher's Lounge "four or five times a week," sometimes in the company of Joel Reagan, where she worked part-time as a bartender. (R. 558) Debra Phillips, the operator of Cher's Lounge, likewise testified that Arthur came to the bar four to five times a week. (R. 617-619) Phillips and Arthur had a romantic relationship and even discussed the possibility of marriage. (R. 622-24) Pat Halliday, a shift supervisor at the Decatur Work Release Center in 1982, "testified there was a discrepancy between the number of hours Arthur was away from the center and the number of hours he was actually paid for working in February and March of 1982." (R1-61 at 11; R. 536-38)

On the afternoon before the day of the murder, Arthur, while at Cher's Lounge, took Patricia Green into the kitchen to speak with her out of hearing range of other bar patrons. (R. 560-62) At Arthur's request, Green sent a friend across the street to purchase .22 caliber mini magnum long rifle bullets. Id. After Green's friend purchased the bullets and brought them back to her, Green gave them to Arthur. Id. Brent Wheeler, an expert in firearm identification, testified that the bullet removed from the victim's body was a .22 caliber long rifle consistent with a CCI brand bullet. (R. 404-05) The four shell casings found near the body were CCI brand .22 long or long rifle casings. Id.

As the federal district court that addressed Arthur's habeas petition correctly stated, the above evidence tended to show that "Arthur had the opportunity and means to kill Troy Wicker." (R1-11 at 11) Furthermore, other evidence corroborated Judy Wicker's testimony. Joel Reagan saw Judy Wicker and Arthur together at the mobile home business. (R. 467) Judy Wicker stated that, on the morning of the murder, she took her sons to school,

drove back and forth on Avalon Avenue a couple of times and then picked Arthur up at the airport. (R. 754-59) This testimony was consistent with the testimony of Sergeant Eddie Lang, a Muscle Shoals police officer who was serving as a school crossing guard on Avalon Avenue that morning. Lang observed Judy Wicker twice pass by the crossing before 8:00 a.m., when he left his post. (R. 306-07)

Judy also testified that Arthur wore an Afro wig and makeup to disguise himself as a black man. Joseph Wallace, an evidence technician with the Alabama Department of Forensic Sciences, removed an Afro wig from the car that Arthur used to make his getaway. (R. 374) Judy testified that Arthur shot Troy Wicker one time and ransacked the house. (R. 768-70) Mr. Wallace, the evidence technician, testified that he found the Wicker home in disarray. (R. 365-67) Dr. Josefino Aguilar, a forensic pathologist, testified that the autopsy performed revealed that the victim had been shot one time. (R. 697-99) Judy testified that on the day of the murder Arthur was carrying a gun and a garbage bag. (R. 760) Debra Phillips testified that Arthur was supposed to meet her for lunch on the day of the murder, but he was late and, instead of going to lunch, they rode to a bridge over the Tennessee River where Arthur stopped the car and threw a garbage bag, that was half-full and bulky and wrapped in a sheet, into the river. (R. 627-34) As he disposed of the garbage bag, Arthur said he was "trying to get rid of some old memories." (R. 632)

Consistent with Judy Wicker's testimony that Arthur was paid $10,000 for murdering her husband, Arthur had a large amount of money in his possession after the murder. Pat Halliday, an employee with the Decatur Work Release Center, testified that Arthur was transferred to the Morgan County Jail after the discovery

of the discrepancy between the number of hours he was away from the center and the number of hours he was actually paid for working. Upon routine inspection of his effects before the transfer, twenty one hundred dollar bills were discovered in an envelope in Arthur's overcoat pocket. (R. 543)

Arthur was his own lead counsel at his trial, but was also represented by Harold Walden, and Walden's son served as stand-by counsel. Arthur conducted the majority of voir dire questioning, examination of witnesses, argument to the jury, and argument to the court. In fact, Arthur cross-examined virtually every one of the prosecution's 13 witnesses, often at length. See, e.g., (R. 375-85) Arthur presented four witnesses in his defense. Bruce Coan, a police detective, testified about his observations of the crime scene. (R. 867) Two of Arthur's four witnesses were called in an apparent attempt to offer an explanation of how, as a prisoner, he came to possess $2100. Bruce Carroll, a friend and fellow inmate, testified that he lost $6500 to Arthur in a poker game. (R. 879-83) Gene Moon, who resided in the Cullman County Jail at the time of his testimony, said that another inmate gave him an envelope with $2000 in it and that Moon put it in Arthur's coat. (R. 927-29) The fourth and final witness, Ronald Spears, an inmate at West Jefferson prison, stated that Patricia Green told him that the police were forcing her to lie about Arthur asking her to buy some bullets for him. (R. 901-07)

The record also reveals that Arthur was searching for witnesses to provide him with an alibi. During cross-examination of Joel Reagan, Arthur asked: "...[D]o you remember Larry Whitman telling you that he saw me the morning that Mr. Wicker was murdered over in Muscle Shoals?" (R. 473-74) There are no references in the trial record to either Alphonso High or Ray Melson, the two

individuals (of which more later) who signed affidavits filed in the federal district court stating they talked to Arthur around the same time Troy Wicker was being murdered, having seen Arthur on the day of the murder.

At the penalty phase, the lawyer who assisted Arthur, Harold Walden, argued that the jury should recommend a sentence of life without parole because of several mitigating factors. First, Walden argued that Arthur had been a model prisoner and had spoken to high school groups as a part of correctional programs to deter young people from committing crimes. (R. 1170) Walden also argued that Arthur's punishment was disproportionate in relation to the other persons that had involvement in Troy Wicker's murder. He told the jury that Judy Wicker, who was just as culpable as Arthur, was soon to be released from prison and that Rowland and McKinney had never been prosecuted for their roles. (R. 1171-72)

Arthur followed Walden and argued to the jury that he should be sentenced to death. Arthur said that Walden was morally opposed to the death penalty and urged the jury to disregard Walden's argument. (R. 1178) Arthur told the jury that he didn't have a death wish; in fact, he said "I wouldn't dare ask you for it if I thought for a minute that I would be executed." (R. 1181) Arthur argued that a death sentence would allow him to have more visitations from his children, (R. 1183), and to have more privacy in his death row cell as opposed to living in general population, (R. 1190), and would allow him to have more control over his appeals. (R. 1186-94) Arthur told the jury that he had already managed to overturn his capital murder conviction on two previous occasions and that, if the jury sentenced him to death, he would be in a better position to overturn his latest capital murder conviction. (R. 1188-89)

C. Arthur's § 1983 (DNA) Action

On April 12, 2007, Arthur filed a § 1983 action seeking access to physical evidence collected in connection with his crime. See (Doc. # 1) In his complaint, Arthur sought an injunction requiring the defendants to grant him access to the following: 1) Judy Wicker's clothing; 2) Judy Wicker's rape kit; 3) a wig and hair samples collected from Judy Wicker's car; 4) vacuum sweepings from the Wickers' den; 5) hair samples from a shoe; 6) spent cartridges, a bullet, and a pillow case; and 7) photographs of the crime scene that were admitted into evidence at trial. Id. at 10-13. Arthur filed his complaint 25 years after his crime, 15 years after his third conviction and sentence of death, nine years after the conclusion of his direct review, five years after the conclusion of his State post-conviction proceeding, six years after he filed his petition for federal habeas relief, and four days before this Court denied his petition for certiorari review of his habeas proceedings. See (Doc. # 14 at 5-7); Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992, at *3-4 (M.D. Ala. Aug, 17, 2007) (a detailed chronology of the proceedings). Furthermore, after filing his § 1983 action, Arthur made no effort to expedite the proceedings. See (Doc. #14 at 10); Arthur, 2007 WL 2381992, at *5 ("Although Arthur has not requested a stay of execution, he also has not requested expedited action on his complaint.").

Because Arthur unjustifiably delayed in filing this lawsuit, the defendants (hereinafter "the defendants or the State") moved to dismiss it on laches and statute-of-limitations grounds.[2] (Doc. #8 at 35-40) On August 17,

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[2] The district court did not address whether Arthur's complaint was time-barred by the statute of limitations. (Doc. #14)

2007, the district court granted the defendants' motion to dismiss. (Doc. #14) In granting the defendants' motion, the district court ruled that this action could not be fully litigated without a stay of Arthur's September 27, 2007 execution. Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992, at *3 (M.D. Ala. Aug, 17, 2007). The district court further held that Arthur is not entitled to a stay of execution for the following reasons: 1) he cannot establish a reasonable likelihood of success on the merits; 2) the balance of the equities "clearly favors the State and operates against the entry of a stay of execution; and 3) he unreasonably delayed in filing this action. See (Doc. #14) Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992, at *3-13 (M.D. Ala. Aug, 17, 2007).

On August 21, 2007, Arthur filed a notice of appeal. (Doc. #16) Thereafter, on August 27, 2007, ten (10) days after the district court dismissed his action, Arthur filed a motion to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (Doc. # 18) In his motion, Arthur argued the following: 1) a new affidavit from Ray Melson provides evidence of innocence; 2) Grayson v. Thompson, 257 F.3d 1194 (11th Cir. 2001), is factually distinguishable; and 3) the court should not consider unreasonable delay in its equity analysis.[3]

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[3] Melson has provided four affidavits throughout Arthur's litigation. The affidavits obtained from Melson in 2002, see Doc. # 18-2 and 18-3, were filed in the district court during habeas proceedings. Arthur filed the initial affidavit from Melson, see Doc. # 18-2, that stated that Melson saw Arthur in Decatur about the same time that the murder was taking in muscle shoals. The State submitted a counter-affidavit from Melson, see Doc. 18-3, that stated that he was unsure on what day he saw Arthur. Arthur filed yet another affidavit from Melson, see Doc. # 18-5, on August 27, 2007 that stated that he saw Arthur on the morning of the murder. The defendants obtained yet another affidavit

On August 30, 2007, the district court denied Arthur's Rule 59(e) motion. (Doc. #19) Thereafter, on September 21, 2007 the Eleventh Circuit Court of Appeals affirmed the district court's dismissal of Arthur's § 1983 lawsuit. Arthur v. King, No. 07-13933, 2007 WL 2744884 (11th Cir. Sept. 21, 2007).

REASONS FOR DENYING THE WRIT

As an initial matter, it bears emphasis that Arthur is not challenging the validity or constitutionality of his conviction or sentence. Instead, he asks this Court to hold that he has a right to delay the administration of his sentence of death in order to enable him to litigate whether or not he has a constitutional right to post-conviction access to evidence. In other words, Arthur seeks a ruling from this Court that, under the Constitution of the United States and federal law, he has a right to delay his September 27, 2007 execution to afford him sufficient time to investigate the facts of his 1982 crime. This Court should decline to grant certiorari review.

I. This Court Should Decline To Review The Issues Presented By Arthur Because His Petition Is (At Most) A Request For Fact-Bound Error-Correction.

The district court dismissed Arthur's action based on the following fact-bound determinations: (1) Arthur unreasonably delayed in filing his § 1983 action; (2) due to that delay the merits could not be litigated without the

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from Melson stating the he does not know when he saw Arthur. Arthur v. King, No. 07-13933, 2007 WL 2744884 (11th Cir. Sept. 21, 2007).

entry of a stay of execution; and 3) he is not entitled to a stay. Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992 (M.D. Ala. Aug, 17, 2007). Applying binding precedent from this Court to the district court's factual determinations, the Eleventh Circuit affirmed the dismissal of Arthur's action. Arthur, 2007 WL 2744884 (applying the equitable principles that were reiterated in Hill v. McDonough, __ U.S. __, 126 S.Ct. 2096, 2104 (2006) and Nelson v. Campbell, 541 U.S. 637, 650, 124 S.Ct. 2117, 2126 (2004)).

Because the district court's dismissal of this action and the Eleventh Circuit's affirmance rests soundly an application of this Court's precedent to the district court's factual determinations, Arthur can only seek fact-bound error review. See Pet. at 22 (The Eleventh Circuit . . . made erroneous factual determinations. . . ."); Pet. at 23-28 (Arthur merely contests the factual determination that favorable results of the testing he seeks cannot establish his innocence.). As this Court is well aware, however, a request for what can only be understood as pure fact-bound, error-correction is, as a general rule, an insufficient basis for certiorari. See Sup. Ct. R. 10; R. Stern, E. Gressman, et al., Supreme Court Practice § 4.14, at 249 (8th ed. 2002). Therefore, this Court should deny Arthur's petition for writ of certiorari.

II. This Court Should Decline To Review The Issues Presented By Arthur Because He Has Not Established A Traditional Rule 10 Ground For This Court To Exercise Its Discretionary Review.

This Court should decline to review the issues presented by Arthur because he has not (and cannot) established any of the tradition Rule 10 grounds for granting certiorari – a conflict with other circuits or state

courts of last resort or an important question of federal law. Sup. Ct. R. 10.

In Hill v. McDonough, __ U.S. __, 126 S.Ct. 2096, 2104 (2006), this Court recognized numerous equitable principles that courts should consider when a death row inmate files a § 1983 action in the face of an imminent execution. 126 S. Ct. at 2104. The Eleventh Circuit correctly stated:

> Those equitable principles include (1) "sensitiv[ity] to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts," (2) the plaintiff's satisfaction of "all of the requirements for a stay, including a showing of a significant possibility of success on the merits," (3) the application of "a strong equitable presumption against the grant of a stay where the claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay," and (4) protection of the "States from dilatory or speculative suits." Hill v. McDonough, 126 S. Ct. 2096, 2104 (2006) (quoting Nelson v. Campbell, 541 U.S. 637, 649-50, 124 S. Ct. 2117, 2126 (2004). The strong interest of the State and the victims' families is in "the timely enforcement of a sentence", id. at , 126 S. Ct. at 2104, which acquires "an added moral dimension" once post-trial proceedings finalize. Calderon v. Thompson, 523 U.S. 538, 556, 118 S.Ct. 1489, 1501 (1998).

Arthur, 2007 WL 2744884 (emphasis added). In affirming the district court's determination that Arthur is not entitled to a stay of execution, the Eleventh Circuit applied the equitable principles detailed by this Court in Hill. Id.

Arthur hopes to catch this Court's eye by alleging a circuit split; however, the split he identifies is illusory. Pet. at 14-19. Arthur makes two arguments to support his contention that a circuit split exists. First, Arthur alleges that the Fifth, Eighth, and Eleventh Circuits use an unreasonable delay requirement while the Ninth Circuit employs a fact-specific inquiry. Id. Second, Arthur contends that the Sixth Circuit ignores equitable standards and has adopted a statute-of-limitations rule. Id. The State addresses each of these items in turn.

A. Arthur's Contention That The Ninth Circuit Conflicts With The Eleventh Circuit Is Misleading And Erroneous.

In his petition, Arthur contends that in determining whether to apply the strong equitable presumption against granting a stay the Eleventh Circuit makes no inquiry into the specific facts of a petitioner's delay while the Ninth Circuit "requires a fact-specific inquiry." Pet. at 19. In order to make this argument, Arthur has misrepresented the proceedings below as well as numerous holdings from the Eleventh Circuit (including the holding in this case). As will be shown, like the Ninth Circuit, the Eleventh Circuit requires a fact-specific consideration of the equitable principles detailed by this Court.

In Beardslee v. Woodford, 395 F.3d 1064 (9th Cir. 2005), the very case mentioned in Arthur's petition, the Ninth Circuit applied a "timeliness" inquiry to deny a stay of execution. Id. at 1069-70. In fact, the Court stated: "To be sure, as the Supreme Court has instructed in Nelson and Gomez, the district court is entitled to take delay into consideration in exercising its equitable powers." Id. at 1069. The Beardslee Court then ruled that the district court erred by applying a "general rule that a claim was dilatory if first filed at the time when the

possibility of execution became imminent." Id. at 1070. Instead, courts should conduct "a fact-specific inquiry to ascertain whether the claims could have been brought earlier, and whether the petitioner had good cause for delay." Id.[4]

Like the Ninth Circuit, the Eleventh Circuit has repeatedly held that "the equitable considerations in each case are naturally different. . . ." Arthur, 2007 WL 2744884; Jones v. Allen, 485 F.3d 635, 641 n. 4 (11th Cir. 2007) ("the equitable considerations in each case are naturally different."). In this case, both the district court and the Eleventh Circuit analyzed Arthur's delay by considering Arthur's actions and the specific facts of Arthur's case. Arthur, 2007 WL 2744884; Arthur, 2007 WL 2381992 at *1-4, 13 (detailing the Arthur's actions and his delay). In fact, in addressing Arthur's delay, the Eleventh Circuit specifically noted that in 2004 it informed Arthur's attorney that she could file a § 1983 action seeking DNA testing. Arthur, 2007 WL 2744884, at *n.5.

Despite Arthur's argument to the contrary, the Eleventh Circuit, like the Ninth, does apply a fact-specific timeliness inquiry. Thus, there is no circuit split with the Ninth Circuit, and this Court should deny certiorari and deny the stay application.

B. This Court Should Not Grant Certiorari Because The Sixth Circuit Has Time-Barred a Lethal-Injection Challenge Based On The Statute of Limitations.

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[4] The Beardslee Court, despite stating that a "fact-specific inquiry to ascertain whether the claims could have been brought earlier [] and whether the petitioner had good cause for the delay," see Beardslee at 1070, engaged in no such inquiry.

The district court in this case did not address the State's motion to dismiss Arthur's complaint on statute-of-limitations grounds. The State did not raise the statute-of-limitations issue in its Eleventh Circuit brief. It is unclear why Arthur believes that certiorari should be granted on an issue that was not addressed by the district court and not raised in the Eleventh Circuit.

Recently, the Sixth Circuit, in Cooey v. Strickland, determined that a death row inmate's § 1983 method-of-execution challenge accrues for statute-of-limitation purposes at the conclusion of direct review – when the sentence becomes final – or when the State elects lethal injection as its method of execution. Cooey v. Strickland, 479 F.3d 412, 422 (6th Cir. March 2, 2007), rehearing denied, Cooey v. Strickland, __ F.3d __, 2007 WL 1574663 (6th Cir. June 1, 2007).[5] The Cooey case appears to be the only reported decision of a federal appeals court addressing the issue of when a death-row inmate's § 1983 method-of-execution challenge accrues for statue of limitation purposes. In a recent case, the Sixth Circuit applied the "timeliness" inquiry articulated in Nelson and Hill in denying a stay of execution. Workman v. Bredesen, 486 F.3d 896, 911 (6th Cir. 2007). The Court further stated that the claim was time-barred under either the majority or dissent's analysis in Cooey. Id. Thus, the Sixth Circuit did not have to apply the equitable standard used here.

As previously stated, the district court did not address the statute-of-limitations issue and it was not raised in the Eleventh Circuit. Thus, the statute of limitations

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[5] A petition for certiorari filed by the plaintiff inmate in Cooey is pending. Cooey v. Strickland, 07-6234.

issue is not presented in this case and is not a reason for this Court to grant certiorari.

As stated above, this Court has held that courts must apply "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." Hill v. McDonough, 126 S. Ct. 2096, 2104 (2006) (quoting Nelson v. Campbell, 541 U.S. 637, 649-50 (2004)). The courts below applied this Court's precedent, which is binding on all circuit courts; therefore, Arthur cannot establish a circuit split.

Further, because this Court has detailed the equitable principles courts must consider when deciding whether equitable relief is available, Arthur cannot show that decision below rests on an important question of unsettled federal law. Consequently, Arthur cannot establish a traditional Rule 10 ground for this Court to exercise its discretionary review, and the petition should be denied.

III. The Court Should Deny Arthur's Petition For Certiorari And His Motion For A Stay Of Execution Because The Eleventh Circuit's Decision Was Correct.

As stated above, the district court dismissed Arthur's § 1983 action seeking access to evidence for the following reasons: (1) Arthur unreasonably delayed in filing his § 1983 action; (2) due to that delay, the merits could not be litigated without the entry of a stay of execution; and 3) he is not entitled to a stay. Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992 (M.D. Ala. Aug, 17, 2007). Arthur and Arthur alone chose when to file this action. He could have filed it years ago, when there was plenty of time to fully litigate the merits, yet, he chose to wait until he knew that an execution date would be set.

Against this backdrop, the Eleventh Circuit faithfully applied the equitable considerations detailed by this Court in Hill and Nelson and affirmed the district court's dismissal.

A. The Eleventh Circuit Correctly Determined That Arthur Unreasonably Delayed In Filing This Action.

This Court reiterated in Hill what it said in Nelson, 541 U.S. at 649-50, about a stay of execution being an equitable remedy, not available as a matter of right, and that federal courts considering a stay request must be "sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." Hill v. McDonough, 126 S. Ct. 2096, 2104 (2006). "The federal courts can and should protect States from dilatory or speculative suits. . . ." Hill, 126 S. Ct. at 2104. To accomplish this objective, "[a] court considering a stay must . . . apply "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." Id. (quoting Nelson v. Campbell, 541 U.S. 637, 649-50 (2004)); See also Gomez v. United States Dist. Court for Northern Dist. of Cal., 503 U.S. 653, 654, (1992) (per curiam) (noting that the "last-minute nature of an application" or an applicant's "attempt at manipulation" of the judicial process may be grounds for denial of a stay).

Arthur unreasonably delayed in filing this action and due to his decision to wait until the 11th hour to file this action, the courts below could not reach the merits without entering a stay of execution.[6] As the district court

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[6] On pages 29 and 30 of his petition, Arthur attempts to excuse his delay by arguing he waited to file his § 1983 action until his habeas

correctly found "Arthur's request cannot be litigated without entry of a stay of execution." Arthur, 2007 WL 2381992, at *4. "Nine weeks after this action was filed, the Alabama Supreme Court set Arthur's execution date for September 2[7], 2007." Id. at *5. With five months to litigate the merits of this action and knowing that it took over four years for Darrell Grayson to litigate an identical claim, Grayson v. Allen, 491 F.3d 1318, 1319 (11th Cir. 2007), Arthur made no effort to expedite the proceedings. Id. at *3-5. Once in the Eleventh Circuit, Arthur (finally spurred into action) sought expedited briefing and a stay of execution. See Arthur, 2007 WL 2744884. Arthur's actions were too little too late. As Grayson v. King, demonstrates, the merits of Arthur's complaint (not to mention appeals) would take much longer than five months, a reality that a last-minute request for expedited proceedings cannot cure.

The courts' inability to reach the merits without a stay of execution is due solely to Arthur's unreasonable delay in filing the action. "Arthur was first convicted of Troy[] [Wicker's] murder in February 1982." Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992, at *13 (M.D. Ala. Aug, 17, 2007). "With two successful appeals and resulting new trials in state court, Arthur was convicted a second time on May 13, 1987, and a third time on December 5, 1991." Id. at *10. Six years prior to filing his current

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proceedings neared conclusion to conserve judicial resources. According to Arthur, it would have been unreasonable for him to "ignore[] the important interest in conserving scarce judicial resources" by pursuing his § 1983 action while his habeas action was pending. Pet. at 29-30 Arthur's alleged noble intentions are belied by the fact that he filed two separate § 1983 actions in two separate federal district courts when these two actions could have been filed together in the Middle District of Alabama.

action, Arthur filed his habeas petition and sought a stay of execution. Id. (citing Arthur v. Haley, 248 F.3d 1302, 1303 (11th Cir. 2001) (motion to vacate stay denied). During his habeas proceedings, Arthur sought and was denied discovery of the same evidence he seeks in this action. Arthur, 2007 WL 2744884.

He waited fifteen years after his third conviction and sentence of death, and six years after he filed his federal habeas petition to file his action seeking access to evidence. Arthur, 2007 WL 2381992, at *10. He has known since the habeas court denied his motion for discovery in 2002 that the State would not voluntarily grant him access to the evidence. In fact, Arthur wrote the defendants seeking access to the evidence in 2003 and was "[o]bviously, . . . unsuccessful in his requests." Id. Armed with the knowledge that the State would not grant him access to the evidence he sought, Arthur waited five years to bring this lawsuit.

Moreover, during those five years, Arthur became well aware that he could seek access to evidence by filing a § 1983 lawsuit. On September 23, 2002, four and a half years before Arthur filed his current action, the Eleventh Circuit determined that a prisoner may seek access to evidence by filing a § 1983 action. See Bradley v. Pryor, 305 F.3d 1287, 1289-91 (11th Cir. 2002). Additionally, during oral argument regarding Arthur's federal habeas action, the Eleventh Circuit specifically informed Arthur's current attorney Suhana Han that Arthur could seek access to physical evidence in a § 1983 action. Arthur, 2007 WL 2744884, at *n. 5 ("[D]uring oral argument on Arthur's federal habeas petition in 2004, Arthur's counsel was reminded that she could seek access to physical evidence in a § 1983 claim."). These facts establish that Arthur was aware that he could seek access to evidence by filing a § 1983, yet, chose to wait to file this action until

the merits could not be reached without the entry of a stay of execution.

Even after Arthur filed this § 1983 action and the Supreme Court of Alabama set an execution date, he continued to delay. As the district court noted, Arthur never "requested expedited action on his complaint." Arthur, 2007 WL 2381992, at *5; see also Arthur, 2007 WL 2744884 (11th Circuit noted that Arthur did not move the district court to expedite the proceedings). Arthur's delay in prosecuting his action is evidenced by the fact that he did not obtain the third Melson affidavit until after the District Court dismissed his action. As the district court aptly stated, "[t]he court cannot fathom, if this is in fact 'powerful evidence of Mr. Arthur's innocence'" (Mot. at 3.), why the statement did not surface one, two, three, or four years after the 2002 repudiation affidavit, or even as an exhibit filed with the complaint in April 2007." Arthur, 2007 WL 2539962, at *2. The district court went on to "conclude that [Arthur's Rule 59] motion is a desperate last-minute effort in the shadow of an execution date to postpone or avoid that date." Id.

Furthermore, Arthur could have filed this action in such a time as to allow a determination of the merits without the entry of a stay of execution. Between the time that the Eleventh Circuit decided Bradley and the time that Arthur chose to file his § 1983 action, another death row inmate, Darrell Grayson filed an identical lawsuit and fully litigated whether he was entitled to access to evidence. See Grayson v. King, 460 F.3d 1328 (11th Cir. 2006). While Grayson litigated his claim to access to evidence, Arthur waited until a merits determination could not be reached without a stay of execution.

Because Arthur "could have . . . brought [this action] at such a time as to allow consideration of the merits without requiring entry of a stay" but chose not to do so,

the courts below properly applied the "strong equitable presumption" mandated by this Court and correctly determined that Arthur is not entitled to a stay. Id. (quoting Nelson, 541 U.S. at 649-50). Therefore, this Court should deny Arthur's petition for certiorari and his motion for a stay of execution.

B. The Courts Below Correctly Determined That Arthur Is Not Entitled To A Stay Of Execution Because The Balance Of The Equities Weigh Against Him.

The courts below correctly determined that Arthur is not entitled to a stay of execution because the balance of the equities firmly tilts against him. "[T]he equitable considerations in each case are naturally different. . . ." Arthur, 2007 WL 2744884 (quoting Jones v. Allen, 485 F.3d 635, 641 n. 4 (11th Cir. 2007)). No matter what factual distinctions exist, however, "[a] court considering a stay of execution must ... apply a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." Hill v. McDonough, 126 S. Ct. 2096, 2104 (2006). As detailed above, the district court determined that Arthur unreasonably delayed in filing this action and properly applied the strong equitable presumption mandated by this Court.

Applying the equitable considerations detailed by this Court and balancing the equities, the courts below properly determined that "Arthur fail[ed] to overcome the strong equitable presumption against the grant of a stay." Arthur, 2007 WL 2381992, at *4. First, Arthur's interest in adjudicating his claims is weakened by the fact that he cannot establish a reasonable likelihood of success on the merits. Arthur, 2007 WL 2744884 ("The evidence which he seeks is the same evidence that was considered by the

district court during his habeas corpus petition and which will not clearly exonerate him. He is unable to show a likelihood of success on the merits and the balance of the equities weigh against the grant of a stay."). His interest is further weakened because the evidence he seeks cannot establish his innocence, and thus is of no use to him. Id. (Section III.C. of this brief).

The State, on the other hand, has a well recognized interest in enforcing its duly adjudicated judgment. It is well settled that, "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." Hill, 126 S. Ct. at 2104 (citing Calderon v. Thompson, 523 U.S. 538, 556 (1998)); see also Jones, 485 F.3d at 638 (same); Grayson v. King, 460 F.3d 1328, 1342 (11th Cir. 2006) ("[T]he government has a strong interest in the finality of duly adjudicated criminal judgments."). Once the post-trial proceedings have run their course, as here, the "State's interest in meting out a sentence of death in a timely manner acquires 'an added moral dimension.'" Arthur, 2007 WL 2381992, at *12 (quoting Calderon v. Thompson, 523 U.S. 538, 556 (1988). "To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." Calderon v. Thompson, 523 U.S. 538, 556, 118 S.Ct. 1489, 1501 (1998). "Each delay, for its span, is a commutation of a death sentence to one of imprisonment." Thompson v. Wainwright, 714 F.2d 1495, 1506 (11th Cir.1983). The district court correctly determined that the State and the victims' interests in the timely enforcement of its judgment outweigh Arthur's request for access to evidence that can not establish his innocence.

Because the balance of the equities clearly disfavors a stay of execution, Arthur cannot establish that the courts

below abused their discretion by dismissing this action. Therefore, this Court should deny his petition for writ of certiorari. Likewise, this Court should deny Arthur's request for a stay of execution.

C. The Courts Below Correctly Determined That Arthur Could Not Establish A Likelihood Of Success On The Merits; Therefore, He Was, And Is, Not Entitled To A Stay Of Execution.

In his complaint, Arthur alleged that the denial of access to evidence violates the following: 1) his right to due process; 2) his right to access to courts and equal protection; 3) his right to be free from cruel and unusual punishment; and 4) his right to apply for executive clemency. For numerous reasons, the district court properly determined that Arthur could not establish a likelihood of success on the merits of these claim.

Although there are many reasons the district court correctly found that Arthur could not establish a reasonable likelihood of success on the merits, see Arthur, 2007 WL 2381992, at *5-11, one overriding fact makes this case particularly unworthy of certiorari review: Favorable test results on the evidence Arthur seeks will not exonerate him and cannot undermine confidence in the outcome of the trial. Arthur, 2007 WL 2381992, at *7 ("Arthur cannot establish that DNA testing, even if the testing results in a favorable outcome, will exonerate him of murder."); Arthur, 2007 WL 2744884 (same).

As United States District Judge Edwin Nelson, in his order dismissing Arthur's habeas petition, stated:

> Although Arthur generally claims that a new examination of the evidence might obtain results contrary to Wicker's version of events, his specific allegations do not support his claim. He has a notion that blood typing or DNA testing of Judy

Wicker's bloody clothing might show someone else assaulted her, but there is no basis in the record for his belief that the blood on her clothing belonged to her assailant. Rather, the evidence was that Wicker was assaulted from behind, did not struggle, and was bleeding due to extensive head and face injuries. Arthur contends examination of the rape kit and vacuum sweepings could support Wicker's prior testimony about being assaulted and raped by someone else, but merely showing another person was with Judy Wicker or in her home at some unspecified time does little to support her prior testimony or further impeach her testimony about Arthur's involvement. At best, it would provide some additional inference about Judy Wicker's veracity, a subject which was amply covered during the trial. Arthur also speculates that DNA tests of the wig and hair samples from the car could show Wicker fabricated her testimony that Arthur wore a wig and dark face makeup to disguise himself as a 'black man.' However, expert testimony at the trial indicated the hair samples were of African American origin. Arthur provides no support for his speculation that different tests could impeach Wicker's testimony. Experts testified the cartridge casings and bullets were consistent with the type of ammunition Patricia Green obtained for Arthur on the day prior to the murder. Arthur hopes that his tests might now show an inconsistency, but does not explain the reasons for his expectation. Finally, Arthur seeks to resolve a discrepancy he perceives in the evidence. He points to expert testimony indicating gunpowder residue on the pillowcase found beneath Troy Wicker's head show the murder weapon was not discharged at close range.

> This, he argues, conflicts with Wicker's testimony that her husband was shot while sleeping and the autopsy report that Troy Wicker died of a gunshot wound to the right eyelid 'fired at a close range.' He seeks to examine the pillowcase and crime scene photographs to resolve this discrepancy. Judy Wicker did not testify about the distance between the killer and her husband so the discrepancy is not relevant to her testimony. Any discrepancy between the expert witnesses was heard and resolved by the jury and no further investigation is warranted.

(Doc. #8-1); Arthur, 2007 WL 2744884, at *n.4. United States District Judge Scott Coogler, in denying Arthur's motion to alter or amend the judgment, likewise ruled that favorable test results would not establish factual innocence.

> ...Arthur's conjectures about the relevance of the evidence of his claim of actual innocence fall far short of 'specific allegations showing reason to believe' that the fully developed facts might entitle him to relief. Arthur seeks DNA testing of the blood on Judy Wicker's clothing, stating that he wants to show her assailant was someone other than him, but offers no 'reason to believe' that the blood on Judy Wicker's clothing came from anyone other than Judy Wicker. Arthur seeks to examine the 'afro' wig and Negroid hair samples taken from Judy Wicker's car, contending testimony that the hair was forcibly removed and the inside of the wig was free of hair was inconsistent with Wicker's testimony that Arthur wore a black wig to disguise himself. While there has been no explanation for the hair found in the car and the lack of hair in the wig, the findings are not inconsistent with Wicker's

testimony. Further, Arthur offers no 'reason to believe' his examination would reveal anything other than what is already established, and therefore, there is no 'reason to believe' his examination could show he is 'more than likely' innocent.

Arthur seeks access to the bullet recovered from Troy Wicker's body and four spent cartridge casings found at the scene, claiming Patricia Green's testimony that she sent a third party to purchase .22 mini magnum long rifle bullets for Arthur on the day before the murder was insufficiently corroborated by the ballistic expert's testimony that the recovered bullet was a .22 long rifle caliber consistent with a CCI brand mini mag and the four shell casings were CCI brand .22 long or long rifle casings. But, Green's testimony was consistent with the testimony of the ballistic expert and does not require corroboration. Moreover, Arthur does not offer 'reason to believe' that his examination of the bullet and casings will reveal any different information from that already discovered by the experts.

Arthur seeks access to a gunpowder-tainted pillowcase and crime scene photographs arguing he must resolve an inconsistency between the ballistic expert's testimony and the autopsy report regarding the 'critical issue' of whether the gun was fired at close or far range. However, he offers no explanation for his conclusory claim that this discrepancy is 'critical' to his claim of actual innocence. He implies that he might be able to impeach Judy Wicker's testimony that her husband was sleeping when he was shot, but

> Wicker did not testify about the distance from which Troy Wicker was shot.
>
> Arthur seeks to test Judy Wicker's rape kit. He alleged in his initial motion and in his present motion that Judy Wicker previously testified a 'black man' forced his way into her home, beat her, raped her, and killed her husband, but he did not point to any evidence of record that supports his assertion. This Court's review of the published opinions and the transcript of Arthur's last trial did not uncover any testimony that Judy Wicker was raped or that she had sexual intercourse on the morning of her husband's murder. Arthur has not offered any reason to believe that testing the rape kit would help show he was 'more likely than not' actually innocent of Troy Wicker's murder. Similarly, Arthur has not explained how examination of vacuum sweepings of the Wicker home could show he is 'more likely than not' actually innocent.
>
> Finally, none of the physical evidence can help Arthur establish his gateway claim of actual innocence because such a claim must rest on 'new reliable evidence' which was 'not presented at trial.' Schlup v. Delo, 513 U.S. 298, 324 (1995). Although Arthur claims some of the items were not tested, he does not claim or show that the items or proposed tests were unavailable at the time of his trial. Many of the items were admitted at trial. Thus, this evidence is not 'new' as required by Schlup.

(Doc. #8-2); Arthur, 2007 WL 2744884, at *n.4. Based on the evidence presented at trial, granting Arthur access to physical evidence, the testing of which would not have altered the outcome of his trial, would be of little or no

probable value. Id. Thus, the district court correctly determined that the only purpose for which Arthur could use the evidence he seeks is "to discredit the veracity of the testimony of Judy with the speculative results of DNA evidence." Id.

Discrediting Judy Wicker, however, would be of little or no value to Arthur because there was overwhelming evidence corroborating Wicker's testimony and independently establishing his guilt. As the district court below outlined:

> Thirteen witnesses testified for the State, many of whom corroborated Judy's testimony. Various witnesses testified to events outside of Judy's testimony that implicated Arthur in Troy's murder. Of particular interest is the testimony that twenty one hundred dollar bills were found in Arthur's coat pocket after Troy's murder; that Tynes observed Arthur throw a garbage bag into the Tennessee River on the day of the murder in order to "get rid of some old memories;" that Green obtained .22 long rifle bullets for Arthur on the day before the murder; that Arthur told Green that someone would be murdered; that the bullet found in Troy's body and the shell casings found at the scene were from .22 long rifle bullets; and that Reagan could not testify as to the whereabouts of Arthur on the day of Troy's murder.

Arthur, 2007 WL 2381992, at *6. Based on the foregoing, the district court correctly found that "[t]he discrediting of Judy's testimony would not exonerate Arthur of Troy's murder or undermine confidence in the conviction of Arthur in view of the evidence otherwise linking him to the murder." Id. at *7.

With overwhelming evidence corroborating Judy Wicker's testimony and independently establishing Arthur's guilt, certain inescapable conclusions necessarily follow. First, Arthur cannot establish that testing the evidence and discrediting Judy Wicker's veracity would undermine confidence in the outcome of the trial, United States v. Bagley, 473 U.S. 667, 682 (1985); therefore, he cannot establish that he is entitled to such testing under Brady v. Maryland, 373 U.S. 83 (1963). Second, he cannot establish that there is any additional procedural value in granting him access to the evidence or that there is any risk of an erroneous deprivation of his life or liberty through the procedures used (three trials, direct appeal, state post-conviction, and federal post-conviction proceedings). Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Third, Arthur cannot establish that the denial of access to non-exculpatory evidence has violated his right to effectively petition for executive clemency. Finally, testing of the evidence cannot establish a gateway claim of innocence under Schlup v. Delo, 513 U.S. 298, 324 (1995), nor can it establish a hypothetical Eight Amendment innocence claim under Herrera v. Collins, 506 U.S. 390, 414, 113 S. Ct. 853, (1993). Consequently, Arthur cannot establish that the defendants refusal to grant him of access to evidence violates his right to due process, to access to courts, to equal protect, to be free from cruel and unusual punishment, or to apply for clemency. In short, the only true value Arthur could derive from testing the evidence he seeks is the further delay of his execution.

Because favorable results from testing the evidence Arthur seeks could not establish his innocence or undermine confidence in the outcome of the trial, the courts below correctly determined that Arthur could not establish a reasonable likelihood of success on the merits of his access to evidence claim and dismissed this action.

Based on the forgoing, this Court should deny Arthur's petition for writ of certiorari and motion for a stay of execution.

CONCLUSION

For the above-mentioned reasons, this Court should deny the petition for certiorari and the accompanying motion for a stay of execution.

Respectfully submitted,

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